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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANN "BANO" CUMMINGS, et al., Plaintiffs and Respondents, v. GEORGE D. CUMMINGS III, Defendant and Appellant.	H040069 (Santa Clara County Super. Ct. No. 1-12-CV-222017)

In this appeal appellant George D. Cummings III seeks review of an interlocutory judgment ordering a partition by sale of property he owned with his sisters, respondents Ann "Bano" Cummings, Mary Cummings, and Joan Chlarson. Appellant raises several errors in the rulings related to discovery and the admission of evidence at trial. He asserts abuse of discretion in the superior court's decision to partition the property by sale rather than in kind. Finally, appellant contends that the court unfairly denied him an automatic stay and refused his request for a temporary stay, "thereby mooting the most significant aspect of [his] appeal."

Respondents agree with appellant that completion of the sale to a third party has rendered moot the issues pertaining to the events that led to the partition order. We likewise agree that these issues are moot. We will therefore dismiss this appeal.[1]

[1] Appellant raises other issues in his briefs that are not moot. Those pertain to his subsequent appeals of postjudgment orders in *Cummings et al. v. Cummings* (Nov. 23, 2016, H040710, H041307, H041308) [nonpub.opns.], which this court ordered to be considered together with the present appeal.

Background

The focus of this litigation was a 2.9-acre parcel and residence located in Los Altos Hills. The property had been owned by appellant and his sisters' grandfather, George D. Cummings, and then by their father, George D. Cummings II.[2] At his death in October 2010 the second George Cummings left a trust under which the trustee was granted the power to "make contracts of every kind" with respect to trust property, including selling or partitioning it. Ann Bano Cummings and Mary Cummings were the designated successor trustees. Appellant was at that time living on the property with his girlfriend. His sisters conceivably could visit, but they found it difficult to stay at the house because there was too much clutter and debris to make the bedrooms usable.

Because Los Altos Hills had a one-acre minimum restriction on lot size, the subject property could not be divided into any more than two parcels. None of the siblings could afford to buy the others out; Ann Bano Cummings testified that there was "no choice" but to sell the property, and appellant had not devised any solid, viable plan to retain it. On April 5, 2012, a year and a half after their father's death, respondents filed this action for quiet title and partition by sale.

After extensive delays attributable to discovery conflicts[3] and continuances, trial took place between June 26 and July 10, 2013, with appellant representing himself. After hearing the evidence and closing arguments, the trial court ruled that in this situation "only . . . partition by sale can be granted" because of the city's requirement that a subdivision produce at least one acre per lot. It was thus "not practical" to divide the land

[2] At the time of his death, George D. Cummings II actually held a 50 percent interest, the remaining interest having passed from his sisters to his children and to Gloria Parker Tomaselli. Gloria predeceased George D. Cummings II, thus necessitating a search for her heirs.

[3] Appellant's failure to respond to discovery requests led to an award of sanctions against him on May 3, 2013.

in kind equally among the interested parties.[4] Consequently, partition by sale was both necessary and the most equitable "because of the nature of this property and the laws surrounding it." The court therefore appointed a referee to carry out its order and directed appellant to vacate within 30 days of the July 10 hearing. The court set a compliance hearing for August 16, 2013, at which time a writ of possession would be issued in favor of the referee. Meanwhile, the referee was given broad power to "sign off on anything that would normally require [appellant] to have to sign off," including execution of listing agreements, sale agreements, escrow instructions, and closing documents.

The court filed its written order on August 13, 2013. Appellant filed his notice of appeal the next day, along with a "Notice of Automatic Stay" under Code of Civil Procedure section 916. The superior court continued the matter to September 13, 2013, to permit appellant to procure an attorney; the court warned appellant, however, that any stay would likely be conditioned on appellant's posting an undertaking. On that day, the court denied appellant's request for a stay, citing Code of Civil Procedure sections 917.4, 917.5, and 917.6. It initially indicated a willingness to entertain a stay pending posting of a bond under Code of Civil Procedure section 917.9; but after hearing argument from the opposition, the court declined to grant even a conditional stay.

On September 4, 2013, appellant filed two documents in this court: a petition for writ of supersedeas and an application for an immediate stay of proceedings to enforce the order. Both were denied on September 11, 2013. Appellant's petition for review from this court's decision was denied by the Supreme Court on October 15, 2013.

[4] The written order specified that the proceeds of the sale, after certain fees and other expenses, would be divided 50 percent to the trust, 11.25 percent to appellant and each respondent (Joan Chlarson and her husband, Michael Chlarson, to hold one share), and 5 percent to the heirs of Gloria Parker Tomaselli.

[http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2058270&doc_no=S213833.] In January 2014 the property was sold for $8,157,000.

Discussion

Appellant challenges several rulings made by the court during the litigation: the denial of two requests for a continuance; "one-sided" discovery rulings; an order granting respondents' motions to compel appellant's deposition and his answers to written discovery; inconsistent rulings favoring respondents regarding documents at trial that were not produced during discovery; inconsistent and unfair rulings on admission of evidence regarding the feasibility of a partition in kind; and improper admission of evidence attacking appellant's character without allowing him to rebut that evidence.

Appellant readily acknowledges, however, that "the interlocutory judgment of partition may be moot," which he blames on "misguided subsequent orders" by the superior court. In particular, he blames the court's denial of an automatic stay, which resulted in the "injudicious mooting of appellate relief." It is this concession that requires scrutiny, because any mootness will affect the disposition of this appeal.

An appeal is moot when a decision of " 'the reviewing court "can have no practical impact or provide the parties effectual relief." ' [Citation.]" (*DeSilva Gates Construction, LP v. Department of Transportation* (2015) 242 Cal.App.4th 1409, 1416; *Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 391 (*Downtown Palo Alto*); *Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1519.) "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653; *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.)

In this case, appellant states that the partition order may be moot because "the land has been sold and the home demolished." He thus acknowledges that "the demolition of Appellant's family home of three generations and the sale of the land on which it sat mooted the most significant remedy that he might have obtained on appeal." His assessment is correct. It is undisputed that appellant failed to secure an order staying execution of the judgment, not only in superior court but also in this court and the Supreme Court.[5] While in some circumstances a court may address the issues notwithstanding mootness,[6] appellant does not offer any here, besides pointing to the superior court's denial of a stay and other postjudgment orders considered in his companion appeals.[7] Accordingly, "[a]ny ruling by this court can have no practical impact or provide appellan[t] effectual relief." (*Downtown Palo Alto, supra*, 180 Cal.App.3d at p. 391; cf. *City of Riverside v. Horspool* (2014) 223 Cal.App.4th 670, 682 [failure to obtain stay by undertaking or bond on appeal leaves appellate court "unable to fashion any meaningful relief" from order appointing receiver].) We must therefore dismiss this appeal as moot. The issues raised in the companion appeals—those

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[5] At the post-judgment hearing on September 13, 2013, the superior court heard arguments on the issue of whether appellant should be granted a stay pending appeal conditioned on the posting of a bond. As noted earlier, the court denied the request for a stay, citing Code of Civil Procedure sections 917.4, 917.5, and 917.6. The propriety of this ruling is not before us in this appeal, which pertains to the events culminating in the August 13, 2013 order. Also as noted, this court denied his application for an immediate temporary stay and his petition for writ of supersedeas. The Supreme Court denied review from those orders.

[6] "[T]here are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.)

[7] See fn. 1, *ante*.

pertaining to the postjudgment orders awarding costs, attorney fees, and referee fees and expenses—are preserved for review.

Disposition

The appeal from the August 13, 2013 judgment and order is dismissed. Respondents are entitled to their costs in this appeal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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